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No. 85-579

Supreme Court, U.S.
FILED
NOV 1 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WALTER WARREN,

Petitioner,

v.

LOCAL 1759, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STUART A. KIRSCH
STAFF COUNSEL
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES
AFL-CIO (FIFTH DISTRICT)
510 Plaza Drive, Suite 2510
College Park, Georgia 30349

MARK D. ROTH
Counsel of Record
GENERAL COUNSEL
AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO
1325 Massachusetts Ave.,
Washington, D.C. 20005
(202) 737-8700
Attorneys for Respondent

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23 pp

QUESTION PRESENTED

Whether a federal employee can invoke the jurisdiction of the Federal courts to adjudicate a duty of fair representation action against the employee's exclusive bargaining representative.

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STATEMENT OF THE CASE

Respondent AFGE Local 1759 supplements the Petitioner's Statement of the Case as follows to the extent necessary to correct inaccuracies or omissions in that statement.

AFGE Local 1759 declined to take Mr. Warren's first five day suspension to arbitration after a thorough consideration of the matter. The FLRA Regional Director refused to issue an unfair labor practice complaint after conducting an investigation of this matter, including procuring sworn statements from all individuals with relevant information about the charge. By letter dated August 4, 1983 the Regional Director found that the evidence clearly shows that "the Union's Executive Board met on June 6, 1983, discussed your

[Mr. Warren's] grievance and voted unanimously not to invoke arbitration on the basis that the grievance lacked merit. Thereafter, on or about June 12, 1983, Wood [Local 1759 President at that time] informed you of the Executive Board's decision." The Regional Director concluded that the charged party's refusal to proceed to arbitration was not based on a lack of membership status, and there was no evidence that the Union's actions were discriminatory, arbitrary, in bad faith or based on any unlawful considerations. Mr. Warren filed an appeal of that refusal to issue an unfair labor practice complaint to the FLRA General Counsel, who acknowledged receipt of this appeal by letter dated October 28, 1983, and noted an absence of the required notice to the charged party, Local 1759.

What Petitioner's recitation of the Statement of the Case fails to elucidate is that Mr. Warren's institution of a lawsuit in the U.S. District Court on September 30, 1983 occurred during the pendency of the appeal of the first unfair labor practice charge to the FLRA General Counsel and during the pendency of the investigation of the second unfair labor practice charge by the Regional Director.

By letter dated January 26, 1984 the General Counsel of the FLRA denied Mr Warren's appeal on the first unfair labor practice charge. The General Counsel indicated, *inter alia*, that:

> the evidence shows that the Charged Party's President, who met with you several times and discussed your grievance in some detail, thoroughly explained it to the members of the executive committee. Moreover, it was concluded, in agreement with the Regional Director, that the evidence adduced by the investigation fails to show that the Charged Party chose not to proceed to arbitration with your grievance because you are not a member of Local 1759 or because of any other unlawful consideration.

With respect to the second unfair labor practice charge by Mr. Warren regarding Local 1759's refusal to take a second 10 day suspension for further alleged misconduct to arbitration, the Regional Director again, after a thorough investigation of the matter, refused to issue a complaint. By letter dated October 31 ,1983, the Regional Director again found no evidence that the refusal to proceed to arbitration with Mr. Warren's grievance was because of lack of membership status, or the filing of the previous unfair labor practice charge. Similarly, the General Counsel of the FLRA, by letter dated January 30, 1984 confirmed the Regional Director's finding of no evidence of any arbitrary, discriminatory or bad faith conduct in refusing to take the 10 day grievance to arbitration. Mr. Warren's charges were thus fully considered by the FLRA in both instances.

The decisions of the U.S. District Court for the Northern District of Georgia and the Eleventh Circuit Court of Appeals are set forth in the Appendix attached to Mr. Warren's Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

The statutory scheme of Title VII of the Civil Service Reform Act (CSRA) provides for employee redress of a breach of the duty of fair representation by his/her exclusive representative in the nature of back pay and other appropriate relief, by virtue of the unfair labor practice mechanism. 5 U.S.C. Section 7101. *et seq.* That statute sets forth in explicit terms the duty of fair representation owed by labor organizations to bargaining unit members, 5 U.S.C. Section 7114(a) (1), and the procedures for Federal Labor Relations Authority (FLRA) investigation, prosecution, and mandatory relief where unfair labor practices are alleged and demonstrated, 5 U.S.C. Sections 7105, 7116, 7118. The unambiguous language of Title VII of the CSRA provides for

federal jurisdiction in only three circumstances, permiting an individual employee, union or employer to seek judicial relief only to the federal circuit courts of appeals on prescribed final orders of the FLRA.

The case precedent, in virtual uniformity, has determined that Congress has vested the FLRA with exclusive jurisdiction in administering the federal labor management relations program, and that it is manifestly the expressed desire of Congress to create an exclusive statutory scheme, depriving the district courts of jurisdiction. On the exact issue of duty of fair representation suits brought by Federal employees, every court considering the matter, with the sole exception of a District Court in California, has specifically found that it lacked subject matter jurisdiction. As recognized by the Circuit Court below, that California district court's finding of general federal question jurisdiction was based on two faulty premises: the assumed lack of an explicit duty of fair representation provision in the CSRA (as in the case of its National Labor Relations Act [hereinafter NLRA] counterpart) and the perceived inability of the FLRA to provide individual relief to an employee aggrieved by a breach of the duty of fair representation.

Furthermore, Petitioner fails to recognize the hybrid nature of a duty of fair representation/breach of contract action. Mr. Warren's complaint in the District Court alleged a breach of the union's duty of fair representation in its administration of the collective bargaining agreement, which grievance and arbitration procedure is the sole avenue for challenging the underlying employer imposition of suspensions. Duty of fair representation decisions concerning similar issues in the private sector, i.e. refusal to proceed to arbitration for allegedly improper reasons, have relied on Section 301 of the LMRA, 29 U.S.C. Section 185, as the jurisdictional predicate, recognizing also that Section 301 represents a Congressionally created exception to the preemption doctrine. However,

Section 301 does not confer juristiction in this case because Section 301 is inapplicable when the federal government is sued. Congress did not enact in the FLRA a provision analgous to Section 301 of the LMRA, and indeed deleted a provision that would have provided a private cause of action. Congress recognized the special requirements and needs of the federal government, and entrusted broad powers to the FLRA to remedy breaches of the duty of fair representation.

Moreover, this case is not an appropriate one for the court's exercise of its discretionary writ of certiorari. There is unanimity among the two federal circuits and various other courts which have considered this identical issue, and the one lone dissenting opinion by the aforementioned District Court in California. The absence of a conflict between the federal circuits or any constitutional disputes, warrants the denial of the petition for certiorari.

ARGUMENT FOR DENYING THE PETITION FOR CERTIORARI

I. The Civil Service Reform Act Scheme, Legislative History and Major Distinctions with Private Sector Law Demonstrate Clearly that Congress Intended No Independent Federal Court Jurisdiction Over Duty of Fair Representation Actions by Federal Employees Against Their Exclusive Representatives.

Petitioner, as the Circuit Court below analyzed, refuses to recognize or acknowledge the significant differences in the substance and legislative history of the Civil Service Reform Act (CSRA) and its private sector counterpart. Indeed, Petitioner has continually failed to address the genesis of the duty of fair representation suit in the private sector as compared to its treatment in the federal statute. The simplistic, though oft-repeated statement in Mr. Warren's Petition, that

Congress did not expressly limit the federal courts' subject matter jurisdiction over federal employees' fair representation law suits ignores the statutory framework, legislative history and case law developed under the CSRA.

In Title VII of the CSRA, 5 U.S.C. § 7101 *et seq*, Congress gave the Federal Labor Relations Authority (FLRA) the power and duties to take necessary and appropriate actions to effectively administer the provisions of the CSRA. As the Circuit Court below recognized, Congress explicitly empowered the federal courts to act in only three instances. First, it makes judicial review of final orders of the FLRA available only in the appropriate federal circuit court of appeals. 5 U.S.C. § 7123(a). Second, it provides that the FLRA may petition a circuit court of appeals for enforcement of its orders and for appropriate temporary relief or restraining order. 5 U.S.C. § 7123(b). Third, pursuant to 5 U.S.C. § 7123(d), the FLRA, upon issuing an unfair labor practice complaint, may petition a federal district court for temporary injunctive relief. As the courts below recognized, reading the CSRA as a whole, demonstrates that Congress intended for the statutory procedure before the FLRA to be deemed exclusive.

The exclusivity of the statutory administrative labor management scheme in the federal sector has been consistently and uniformly recognized by the courts to foreclose federal court jurisdiction. *NFFE, Local 1263* v. *Commandant, Defense Language Institute*, 493 F.Supp. 675 (N.D. Cal. 1980); *Carter* v. *Kurzejeski*, 706 F.2d 835 (8th Cir. 1983); *Martel* v. *Carroll*, 562 F.Supp. 443 (D. Mass, 1983). In *Clark* v. *Mark*, No. 79-CV—777, slip op. (N.D.N.Y., 1980) the court stated that the "FLRS' (Federal labor relations statute) legislative history demonstrates, that the FLRA was intended by Congress to possess and exercise exclusive jurisdiction over cases involving complaints which allege violations of the FLRS." In *Columbia Power Trades Council* v. *U.S. Dept. of Energy*, 671

F.2d 325 (9th Cir. 1982) the court held that it had no jurisdiction over a suit by a federal employee's union seeking mandamus of an agency administator to implement an arbitrator's award. Finding the FLRA was vested with exclusive jurisdiction, the Court stated that "at no point does the Act entitle a party to petition a district court for relief." 671 F.2d 327. *Accord: Yates* v. *U.S. Soldiers' and Airmens' Home*, 553 F. Supp. 461, (D.D.C. 1982)

Most significantly, the Petitioner chooses to completely ignore the core of the opinion of the District and Circuit Courts below, that despite Congress' patterning the FLRA in many respects after the National Labor Relations Board (NLRB), Congress did not enact a provision in the CSRA that parallels Section 301 of the Labor Managment Relations Act (LMRA) (29 U.S.C. 185 (a)). Section 301 of the LMRA provides in pertinent part:

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce...or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties.

Thus as the Circuit Court noted, Section 301 confers jurisdiction of the district court over suits based upon collective bargaining agreements in the private sector. The exception to the preemption doctrine created in *Vaca* v. *Sipes*, 386 U.S. 171 (1967) for duty of fair representation suits in the private sector was based on the fact that Congress expressly provided suits for breach of the collective bargaining agreement in Section 301 of the LMRA. *Accord: Amalgamated Association of Street Electrical, Railway and Motor Coach Employees of America* v. *Lockridge*, 403 U.S. 274 (1971); *DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S.1 (1983).

As the Circuit Court below further recognized, there is an underlying allegation by Mr. Warren that the breach of the duty of fair representation involved a breach of the collective bargaining agreement by the Employer in imposing the suspensions. In addition, as the Court sets forth (Appendix 9a), Mr. Warren in his complaint stated that "Local 1759 has entered into a collective bargaining agreement with the plaintiff's employer as a result of its exclusive representation of the bargaining unit" and "Local 1759 owes plaintiff a statutory duty to fairly represent plaintiff in all aspects of the administration of the collective bargaining agreement, pursuant to Sec. 7114(a) (1)." The Circuit Court notes correctly that "if appellant's [Mr. Warren's] action had been in the private sector, Sec. 301 would have been the jurisdictional basis because the action involved both the duty of fair representation and breach of collective bargaining agreement claims." As the Fifth Circuit set forth in *In re Carter*, 618 F.2d 1093, 1103 (5th Cir. 1980) "[i]t is only when the allegations in the complaint assert a breach of the duty of fair representation without a corresponding breach of the collective contract, that Federal question jurisdiction is not grounded on Section 301."1/

Section 301 of the LMRA governing private sector labor relations is clearly inapplicable to suits involving the federal sector. 29 U.S.C. § 152.

The CSRA, governing federal sector labor relations, contains no provisions analogous to Section 301 of the LMRA. Not only is there no provision in the CSRA

1/ It is only then that the courts in private sector cases have turned to 28 U.S.C. 1337 regarding actions arising under an Act of Congress regulating commerce. The Petitioner has never asserted jurisdiction under 28 U.S.C. 1337 as it is patent that the CSRA is not an act affecting interstate commerce.

analogous to Section 301, but Congress in enacting the CSRA did in fact consider and reject a proposed provision similar to section 301. As the Circuit Court below set forth, the court in *Yates* v. *U.S. Soldiers' and Airmens' Home, supra*, analyzed the legislative history of the CSRA and discussed the significance of no Section analogue:

> The failure of Congress to provide a clear jurisdictional grant to district courts over disputes involving public sector labor agreements is particularly telling when compared with the approach taken by Congress in the private sector...The Civil Service Reform Act contains no provision analogous to § 301. Not only is the Act silent on the point, but the legislative record indicates that Congress did in fact, consider and reject a proposed provision similar to § 301 when it enacted the Act.

Similarly in *NFFE* v. *Commandant, supra,* 493 F. Supp. at 681, n. 13, this very analysis of the non-existence of a Section 301 parallel was thoroughly considered, with the court finding no legislative or judicial exception to the preemption doctrine. In *Columbia Power Trades Council* v. *U.S. Dept. of Energy, supra*, the court reached the same conclusion and added "[g]iven the abroad purpose of the Act to meet the special requirements of government, the leadership role of the Authority [FLRA], and the limited role of the judiciary in the statutory scheme, it is manifestly the express desire of Congress to create an exclusive statutory scheme."

Moreover the Petitioner ignores the genesis of the duty of fair representation claims in the private sector and the significance of an explicit duty of fair representation provision in the CSRA, not found in its private sector counterpart.

Although the NLRA does not explicitly impose a duty of fair representation, court decisions have established that under that Act, as under the Railway Labor Act, a union has a

duty to represent fairly the employees for whom it acts as exclusive bargaining agent. *Steele* v. *Louisville and Nashville RR,* 323 U.S. 192 (1944); *Ford Motor Co* v. *Huffman,* 345 U.S. 330 (1953). The NLRB however did not recognize that a breach of the duty of fair representation amounted to an unfair labor practice until its decision in *Miranda Fuel Co.,* 140 NLRB 181, 51 LRRM 1584 (1962) enf. denied, 326 F.2d 172 (2nd Cir. 1963). However, in *Vaca* v. *Sipes supra,* this Court implied, but declined to state specifically, that a breach of a union's duty of fair representation constitutes an unfair labor practice under Section 8(b) of the NLRA. In considering the preemption issue and rejecting it, the Court declared it could not assume from the NLRB's "tardy assumption of jurisdiction" in duty of fair representation cases that Congress "intended to oust the courts of their traditional jurisdiction to curb arbitrary conduct by the individual employee's statutory representative." This Court referenced the fact that the NLRB waited until 1962 before deciding that such a breach of duty constituted an unfair labor practice, *Miranda Fuel, supra* 2/.

Thus the concept of a judicial cause of action for breach of the duty of fair representation arose in the private sector prior to any recognition by the NLRB of unfair labor practice jurisdiction over a breach of a duty of fair representation it later construed as implied in the statute. The history of the CSRA is profoundly different. The CSRA provides for an explicit duty of fair representation by unions to employees

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2/ Indeed, the Supreme Court has never specifically affirmed the NLRB's *Miranda Fuel* rule again stating in *DelCostello* v. *International Brotherhood of Teamsters, supra* "We have twice declined to decide the correctness of the Board's [Miranda Fuel] position, and we need not address that question today." Notwithstanding, this implicit duty in the private sector was not specifically recognized by the NLRB until after its inception in the courts.

over which it has exclusive jurisdiction by the language in 5 U.S.C. 7114(a)(1). This section provides:

> An exclusive representative is responsible for representing the interests of all employees in the unit it represents without discrimination and without regard to labor organization membership.

Therefore, apart from the special needs and requirements of federal labor management relations, 5 U.S.C. § 7101; the clearly circumscribed nature of appellate review, *Columbia Power Trades Council* v. *Dept. of Energy supra*; and the absence of an LMRA Section 301 analogue in the CSRA; there is a compelling difference in the statutes governing the union's obligation to employees it represents in the federal and private sector. By statute, there is an unequivocal duty of fair representation owed by federal employee unions to employees over which they have exclusive jurisdiction, and any finding of breach of that duty is within the exclusive purview and remedial powers of the FLRA. Apart from similar unfair labor practices enunciated in the NLRA, the CSRA contains an additional catch-all unfair labor provision at 5 U.S.C. § 7116(b) (8) to "otherwise fail or refuse to comply with any provision of this chapter," specifically here the express duty of fair representation. Furthermore, 5 U.S.C. 7118(a) (7) affords total redress to an individual employee affected by a breach of duty of fair representation as it provides that upon finding an unfair labor practice the FLRA shall issue an order requiring reinstatement, back pay or such other relief as will carry out the purpose of the statute. As the court below recognized, the FLRA has not hesitated to exercise its untrammeled jurisdiction, and invoke its full remedial powers, where appropriate. Therefore, the courts which currently have chartered the parameters of their jurisdiction in these federal sector duty of fair representation matters, have recognized that they need not be burdened with their predecessor court's

concerns, in devloping a judicial cause of action in the private sector for breach of this duty in the 1940's and 1950's, that employee actions may not be redressible. Moreover, as provided *infra,* Congress explicitly rejected a private cause of action in the federal sector.

Additionally, the purpose behind the preemption doctrine is particularly significant in the context of a duty of fair representation charge under the federal labor management statute. There is a clear decision by Congress to vest in one administrative agency nationwide jurisdiction to adjudicate controversies within the Act's purview. *Local 926, Int'l Union of Operating Engineers* v. *Jones* 460 U.S. 669 (1983). The alleged conduct at issue is clearly covered by the CSRA, and does not touch on interests deeply rooted in local feeling or responsibility. *San Diego Building Trades Council* v. *Garmon,* 359 U.S. 236 (1959), *Sears Roebuck and Co.* v. *Carpenters* 436 U.S. 180 (1978). The subject matter of the instant complaint is identical to the claims which were actually presented by Mr. Warren to the FLRA, whose exclusive function is to carry out the purposes of Title VII of the CSRA. The risk of interference with the FLRA's jurisdiction is obvious and substantial. The FLRA's unequivocal unfair labor practice jurisdiction, interpreting an explicit duty of fair representation statute, dictates preemption, even assuming any general basis for invoking the federal court's jurisdiction, which there is none.

As provided herein, the carving out of an exception to the preemption doctrine in the private sector in *Vaca* v. *Sipes, supra* was based in large part on considerations not applicable to the federal statute, because of the rationed absence of a section 301 analogue. As the circuit courts considering this issue have uniformly concluded, the conscious deletion by Congress of a Section 301 analogue in the CSRA, the capable resolution of all matters exclusively in the FLRA, the special requirements of government, and

the explicit narrowly created judicial scheme, dictate a different result.

II. There is No Pertinent or Valid Consideration Dictating Review of this Question on Certiorari

The sole reason formulated by Petitioner for granting the petition in Part II of his argument is that a decision by this court is necessary to settle an important question of law affecting federal employees, on which federal courts have issued conflicting opinions.

Quite unlike the status of the law on this issue as portrayed by Petitioner, there is absolute consistency among the federal circuits and lower courts that have considered this matter, and one lone dissenting assertion of jurisdiction by a Northern District of California District Court in *Karaholios* v. *Defense Language Institute*, 543 F. Supp.1201 (N.D. Cal. 1982).

The federal circuit court below and the Third Circuit in *Wilson* v. *United States*, Appeal No. 84-5735, slip op. (3rd Cir. 1985) however have held that federal courts have no subject matter jurisdiction over duty of fair representation cases brought by federal employees against their exclusive representatives. Similarly in *Butler* v. *AFGE*, Civil Action No. C-81-482, slip op. (N. D. Ohio. 1982) the court granted the exclusive representative's motion to dismiss the duty of fair representation complaint for lack of subject matter jurisdiction. *Accord: Holly* v. *Local 1534*, AFGE, Civ. Action No. SC 4536-82 (D.C. Super. Ct. 1983).

Supreme Court Rule No. 17 provides clearly that a review on a writ of certiorari is discretionary and will be granted only when there are special and important reasons therefor. A recitation in Rule 17 of the general character of reasons that will be considered in ruling on a petition for certiorari nowhere suggests that it would be appropriate to consider a petition for

certiorari where there is absolute consistency among the federal circuits that have ruled on the issue and a singular contrary ruling by a federal district court in a different circuit. With respect to conflicts in the federal courts, Rule 17 provides that a consideration of a case could be made if there is conflict among the federal circuits, although even a conflict among circuits does not mean an automatic grant of certiorari.

A conflict between a decision of a district court and that of a court of appeals is not, absent extraordinary circumstances, a sufficient ground to grant the writ. 13 Moore's, *Federal Practice*, ¶¶ 817.21 (2nd ed. 1985). As Professor Moore further recognizes in citing Harlan, *Manning the Dikes*, 13 Record NYCBA 541,552 (1958).

> Generally speaking, nothing short of a difference of decisions between two Courts of Appeals or between a Court of Appeals and the Court of Claims, whose judgments are reviewable directly by the Supreme Court will suffice to satisfy the conflict rule...A conflict of decisions between two district courts is not a ground for certiorari since resolution of such a conflict is a matter resting with the Courts of Appeals. Nor except in very rare instances will a conflict between a decision of the Court of Appeals and that of a district court in some other circuit suffice. 13 Moore's *Federal Practice*, ¶¶ 817.21 (2d ed. 1985).

Indeed, the Circuit Court below specifically addressed and repudiated the reasoning of the Northern District of California court in *Karaholios, supra* based on its patent reliance on two faulty premises: first, the alleged lack of an explicit duty of fair representation provision in the CSRA, and second, the inability of the FLRA to provide individual relief to employees aggrieved by a breach of the duty of fair representation. The Circuit Court, as provided *infra*,

the explicit narrowly created judicial scheme, dictate a different result.

II. There is No Pertinent or Valid Consideration Dictating Review of this Question on Certiorari

The sole reason formulated by Petitioner for granting the petition in Part II of his argument is that a decision by this court is necessary to settle an important question of law affecting federal employees, on which federal courts have issued conflicting opinions.

Quite unlike the status of the law on this issue as portrayed by Petitioner, there is absolute consistency among the federal circuits and lower courts that have considered this matter, and one lone dissenting assertion of jurisdiction by a Northern District of California District Court in *Karaholios* v. *Defense Language Institute*, 543 F. Supp.1201 (N.D. Cal. 1982).

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> Generally speaking, nothing short of a difference of decisions between two Courts of Appeals or between a Court of Appeals and the Court of Claims, whose judgments are reviewable directly by the Supreme Court will suffice to satisfy the conflict rule...A conflict of decisions between two district courts is not a ground for certiorari since resolution of such a conflict is a matter resting with the Courts of Appeals. Nor except in very rare instances will a conflict between a decision of the Court of Appeals and that of a district court in some other circuit suffice. 13 Moore's *Federal Practice*, ¶¶ 817.21 (2d ed. 1985).

Indeed, the Circuit Court below specifically addressed and repudiated the reasoning of the Northern District of California court in *Karaholios, supra* based on its patent reliance on two faulty premises: first, the alleged lack of an explicit duty of fair representation provision in the CSRA, and second, the inability of the FLRA to provide individual relief to employees aggrieved by a breach of the duty of fair representation. The Circuit Court, as provided *infra*,

recognized that unlike the NLRA or the Railway Labor Act, the CSRA provides for an explicit duty of fair representation and that the FLRA is empowered and has diligently sought relief to federal employees aggrieved by a breach of the duty of fair representation.

Petitioner's suggestion of an uncertainty in the law somehow perplexing civilian federal employees is simply absurd, in light of the unanimity in the circuits, and the full redress available through the FLRA. Nor is there any basis whatsoever for Petitioner's suggestion that the "FLRA administrative processes are also subject to confusion."

The case presented involves no Consitutional issues nor conflict among circuits as to an important federal question. Therefore there is no basis for granting this petition for certiorari.

CONCLUSION:

The Court of Appeals correctly determined that Congress conferred exclusive jurisdiction over a federal employee's duty of fair representation claim in the FLRA. The unanimity of this position by the Circuit Courts considering this issue, militates against granting this Petition for Certiorari.

Respectfully submitted,

STUART A. KIRSCH
STAFF COUNSEL
AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES
AFL-CIO (FIFTH DISTRICT)
510 Plaza Drive, Suite 2510
College Park, Georgia 30349

MARK D. ROTH
Counsel of Record
GENERAL COUNSEL
AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES,
AFL-CIO
1325 Massachusetts Ave.,
Washington, D.C. 20005
(202) 737-8700
Attorneys for Respondent